Yap Kim Swee v Leong Hung Yin

HIGH COURT (KUALA LUMPUR) – DIVORCE PETITION NO 132 OF 1980
SITI NORMA YAAKOB J
4 APRIL 1986

Family Law – Divorce – Ancillary relief – Application for – Applicant has not sought ancillary relief in cross-petition for divorce – Whether applicant subsequently required to obtain leave under r 56(2)(a) of Divorce and Matrimonial Proceedings Rules 1980 when seeking such relief

Family Law – Divorce – Ancillary relief – Application for – Claim for half share in matrimonial home and joint bank accounts – Claim for maintenance and maintenance of only child – Claim for return of jewellery items – Merits of case

This is an application for ancillary relief made by the wife/applicant against the husband/respondent. The husband/respondent was granted a decree nisi of divorce on the sole ground of the wife's adultery. The relief she seeks are: (a) a half share in the matrimonial home which is registered in their joint names; (b) a share in the respondent's registered half share of the matrimonial home; (c) a half share in the amounts standing in their joint current and fixed deposit accounts which had been withdrawn by the respondent; (d) reasonable maintenance since the decree nisi; (e) maintenance for the only child of the marriage and (f) return of certain items of jewellery. At the hearing of the application, a preliminary objection was raised by the respondent that the applicant has no capacity to seek ancillary relief as she had not obtained the necessary leave under r 56(2)(a) of the Divorce and Matrimonial Proceedings Rules 1980 which requires leave to be obtained where an applicant for ancillary relief has not sought such relief in his answer or cross-petition.

Held, granting the application in part:

(1) When granting the decree nisi of divorce to the respondent, the court had also ordered that the proceedings for ancillary relief be adjourned to a date to be fixed. By so ordering, the court must have considered the possibility of either party seeking ancillary relief and since no objection was raised by the respondent before this, he has, by his own conduct, agreed to the applicant applying for ancillary relief and under such circumstances, the applicant need not apply for leave under r 56(2) of the Divorce and Matrimonial Proceedings Rules 1980.

(2) The property is currently registered in their respective names with each party holding a half share each and by virtue of this alone and s 340 of the National Land Code, the applicant has an indefeasible title to the property limited to her half share and it is immaterial for the purpose of division of this property to consider whether she had contributed to its purchase at all. As both parties intend to sell the property, she is therefore entitled to half of the net proceeds of sale representing her registered half share in the property.

(3) As to the applicant's claim for a share in the respondent's half registered share in the matrimonial home, she needs to show the contribution she had made towards the purchase of that half registered share. The applicant and respondent maintains a joint current account from which the purchase money for the property came from. The court finds it hard to accept the respondent's claim that he alone made payment into the joint current account and that all the applicant's salaries given to him were cashed by him but not paid into the joint account. The purpose of a joint current account, particularly between a husband and wife, is to pool all resources into one account and it would be the most natural thing for the applicant to have banked in all her pay cheques into this account as well. Quite apart from this, it must be remembered that the parties had been living together as husband and wife for 17 years prior to their separation and her contribution during that period must surely be her role as a wife and mother, looking after the welfare of the family and the home. Her claim to a share in the matrimonial property is also in no way marred by her adulterous conduct and to that extent, she is entitled to a one-third share of the proceeds of the respondent's half registered share of the property.

(4) The applicant is entitled to a half share of the balance outstanding as at October 1979 of their joint current account as in all probability the applicant had paid all her pay cheques into this account.

(5) The parties also operated a joint fixed deposit account into which the applicant had paid her bonuses, arrears of salaries, redundancy pay, ex gratia payments, salary adjustments and salary differential. The applicant had shown documentary proof of these and in the absence of any proof that she had her own separate bank account, it is natural to expect her to deposit all such payments into this fixed deposit account. She is thus entitled to half the balance.

(6) When considering her claim for maintenance, regard must be had to the degree of responsibility that led to the breakdown of the marriage. In view of the applicant's unqualified admission of adultery and from the pleadings that appears to be the only ground for the breakdown of the marriage and since the applicant had been the guilty party, she is not entitled to any maintenance whatsoever.

(7) As for maintenance for their only child, the court considers that $350 pm will not be too high a sum for a 17-year-old child.

(8) In the absence of any proof as to which item of jewellery belongs to which party and for all practical purposes, the court orders that either party continues to retain whatever jewellery he or she has in his or her possession and to treat such jewellery as belonging to him or her.

[*Editorial Note*: No appeal]

Legislation referred to
Divorce and Matrimonial Proceedings Rules 1980 r 56(2)(a)
National Land Code 1965 s 340

David Morais for the wife/applicant.
CH Liew for the husband/respondent.

Cur Adv Vult

Siti Norma Yaakob J: This application for ancillary relief is made by the wife/applicant against the husband/respondent in whose favour a decree nisi of divorce was granted on 19 March 1984 on the sole ground of the wife's adultery. The relief she seeks are:

(1) a half share in the matrimonial home which is currently registered in their joint names with each party holding a half share each;
(2) a half share in the respondent's registered half share of the matrimonial home;

(3) a half share in the amounts standing in their joint current and fixed deposit accounts at Citibank which had been withdrawn by the respondent in October 1979;
(4) reasonable maintenance for herself since the decree nisi on 19 March 1984;
(5) maintenance for the only child of the marriage limited to a period of five months from November 1984 when the child left the respondent's custody to live with the applicant until 30 April 1985 when the son reached 18 years of age.

In addition, both the applicant and respondent seek the return of certain items of jewellery which each alleges the other had taken away when the marriage broke down.

A preliminary objection was raised by the respondent that the applicant has no capacity to seek ancillary relief as she had not obtained the necessary leave under r 56(2)(a) of the Divorce and Matrimonial Proceedings Rules 1980 which requires leave to be obtained where an applicant for ancillary relief has not sought such relief in his answer or cross-petition. It is not disputed that the applicant had not sought any ancillary relief in her answer and cross-petition which she withdrew at the hearing of the petition. However when granting the decree nisi of divorce to the respondent, the court had also ordered that the proceedings for ancillary relief be adjourned to a date to be fixed. By so ordering, the court must have considered the possibility of either party seeking ancillary relief and since no objection was raised by the respondent before this, he has, by his own conduct, agreed to the applicant applying for ancillary relief and under such circumstances, I do not consider that the applicant need to apply for leave under r 56(2)(a). Moreover, as this rule is only procedural in nature, I do not consider that non-adherence to it is fatal to the applicant and neither has it prejudiced the respondent in anyway.

The parties have been married to each other for at least 17 years before they separated in June 1980. In 1970 they acquired the matrimonial home and it is not disputed that it was paid for from funds standing in their joint current account. The property is currently registered in their respective names with each party holding a half share each and by virtue of this alone and s 340 of the National Land Code, the applicant has an indefeasible title to the property limited to her half share and it is immaterial for the purpose of division of this property to consider whether she had contributed to its purchase at all. As both parties intend to sell the property, she is therefore entitled to half of the net proceeds of sale representing her registered half share in the property.

The position is, however, different as to her claim for a share in the respondent's half registered share in the matrimonial home. In this case, she needs to show the contribution she had made towards the purchase of that half registered share. She has claimed that the purchase price for the house came from the joint current account into which she had deposited her monthly salary and for which withdrawals were made by her as and when the need arose. The respondent whilst not disputing that the purchase money came from the joint current account, however, maintains that he alone made payment into the joint current account and that all the applicant's salaries given to him were cashed by him but not paid into the joint current account. I find this rather hard to accept as the purpose of a joint current account particularly between a husband and a wife, is to pool all resources into one account and it would be the most natural thing for the applicant to have banked in all her pay cheques into this account as well. Quite apart from this, it must also be remembered that the parties had been living together as husband and wife for 17 years prior to their separation and her contribution during that period must surely be her role as a wife and mother, looking after the welfare of the family and the home. I must also add that her claim to a share in the matrimonial property is in no way marred by her adulterous conduct and to that extent, I consider that she is entitled to one third share of the proceeds of sale of the respondent's half registered share of the property.

As I have already stated above, the parties managed a joint current account which in October 1979 when it was closed by the respondent showed a balance of $4,596.50. As I have already indicated above that in all probability, the applicant paid all her pay cheques into this account and for this reason, I hold that she is entitled to a half share of the balance outstanding as at October 1979 which comes to $2,298.25.

In addition to this joint current account, the parties also operated a joint fixed deposit account into which the applicant had paid her bonuses, arrears of salaries, redundancy pay, ex gratia payments, salary adjustments and salary differential for the period from 1972 – 1977. This account too was closed by the respondent in October 1979 and he objects to the applicant's claim to a half share of $9,879.77 that was outstanding at the time the account was closed on the ground that she never made any deposit into the account. The applicant had been working throughout her married life and has shown documentary proof that from May 1972 to September 1977, she had received a total sum of well over $14,000 to account for her bonuses, redundancy payments, etc. A number of cheques were issued in her name and in the absence of any proof that she had her own separate bank account, it is natural to expect her to deposit all such payments into this fixed deposit account in which case, I hold that she is entitled to half the balance amounting to $4,939.88.

When considering her claim for maintenance, regard must be had to the degree of responsibility that led

to the breakdown of this marriage. In answer to the respondent's allegation of adultery, the applicant had also filed an answer and cross-petition alleging adultery on the part of the respondent with a woman named. However, the applicant never proceeded on this allegation as she withdrew her answer and cross-petition on the date of the trial and consented to the defendant being granted a decree nisi on the sole ground of her adultery with the co-respondent who was also condemned to pay damages to the respondent. In view of this unqualified admission of adultery and from the pleadings that appears to be the only ground for the breakdown of the marriage and since the applicant had been the guilty party, I rule that she is not entitled to any maintenance whatsoever.

The respondent has undertaken to foot all expenses for the future education of the only child of the marriage and has also agreed to reimburse the applicant for all expenses incurred by her in maintaining the boy during the five months her son was with her after he left his father's home. Only the quantum of such expense is disputed to by the parties. The applicant has asked for $492 pm whilst the respondent maintains that $305 would be a more appropriate sum. Bearing in mind the needs of a growing 17-year-old, I consider that $350 pm will not be too high a sum as maintenance for a child of that age and for the period of five months that the applicant had to maintain him, the respondent will reimburse her $1,750 ($350 x 5).

Lastly, I come to the various items of jewellery which each party had alleged the other had removed and which neither party is prepared to hand over those which belonged to the other. Counsel for the applicant has suggested that to break the impasse, each party is to hand over jewellery belonging to the other. This may sound very justifiable but from the attitude of both parties, they are also disputing ownership of the jewellery that are in the other's possession. In the absence of any proof as to which item of jewellery belongs to which party and for all practical purposes, I resolved the matter by ordering that either party continues to retain whatever jewellery he or she has in his or her possession and to treat such jewellery as belonging to him or her. Lastly, I also ordered that each party shall bear the costs of this application.

Order accordingly.

Solicitors: *Shearn Delamore & Co; Zaitoon, CH Liew, & Mohd Ali.*

Reported by *Ng Sheau Jiuan*

Shanti Kant Jinghan v Owners or other persons interested in the vessel 'Indera Pertama' & Anor (No 2)

HIGH COURT (KUALA LUMPUR) – ADMIRALTY IN REM NO D1-41-5-88
ZAKARIA YATIM J
28 JANUARY 1988

Shipping – Admiralty in rem – Plaintiff claimed to be cargo owner – Damages for breach of contract and negligence – Warrant to arrest vessel – Shipowner set aside action and warrant of arrest – Cargo seller lodged caveat against release of vessel – Notice to show cause why caveat should not be lifted – Rules of High Court, O 70 r 13(1)

The plaintiff filed a writ of summons in rem against the owners of a vessel, 'Indera Pertama', for damages for breach of contract and for negligence. It claimed to be the owner of 1,332.71 cmb of Sabah round logs ('the cargo') shipped on the 'Indera Pertama' from Sandakan/Weston to Calcutta but the cargo did not arrive in Calcutta. The vessel with the cargo on board was at Pasir Gudang port. The plaintiff obtained an order of the court for the issue of a warrant to arrest the said vessel and the vessel was duly arrested.

On 3 November 1988, on the application of the shipowners, the courts ordered, inter alia, that the writ of summons in this action be set aside; and the order given on 26 May 1988 for the arrest of the vessel be set aside. After this order was made, the seller of the cargo, Malayan Produce Merchants Sdn Bhd, lodged a caveat on 4 November 1988 against the release of the vessel. On 3 November 1988 the senior assistant registrar issued a notice to the cargo seller's solicitors to show cause why the caveat lodged by them should not be lifted in view of the order of the court setting aside the warrant of arrest in respect of the vessel.

Held, not making an order to have the caveat lifted:

(1) Under O 70 r 13(1) of the Rules of the High Court 1980, a person may lodge a caveat if he 'desires to prevent the release of any property under arrest in an action in rem ...'. In other words he must lodge the caveat while the warrant of arrest was in force. In the instant case, since the warrant of arrest had been set aside on 3 November 1988, the vessel was no longer under arrest on 4 November and the question of preventing the release of the vessel on the date the caveat was lodged did not arise. Therefore the caveat lodged on 4 November 1988 is unenforceable and ineffective in law. From the wording of O 70 r 13(1) the caveat cannot apply retrospectively.

(2) In the circumstances, since the caveat was filed wrongly, in that it was filed when the vessel was no longer under arrest, the caveat has no legal effect whatsoever and the court need not make any order to have the caveat lifted. Each party to bear his own costs.

Case referred to

1 *Hong Lee* v *Golden Dragon Shipping (Singapore) Private Ltd* [1976] 2 Lloyd's Rep 462; [1976] 1 MLJ 159 (distd)

Legislation referred to

Rules of the High Court 1980 O 70 r 13(1)

A Fernandez for the caveator.
N Navaratnam for the shipowners.

Cur Adv Vult